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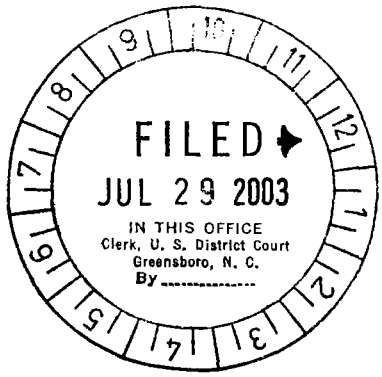
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PEGGY DEAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02CV149
	)	
PHILIP MORRIS USA INC.,	)	
	)	
Defendant.	)	



MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Peggy Dean brought this action against her employer, Defendant Philip Morris USA Inc. ("Philip Morris"), asserting violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. (the "ADA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). The matter is before the court on Defendant's Motion for Summary Judgment. For the reasons set forth herein, Defendant's motion will be granted.

I. BACKGROUND

The following facts are stated in the light most favorable to Plaintiff:

During all relevant periods, Plaintiff, who is white, was an hourly employee at Defendant's cigarette manufacturing plant. In

November 1999, Plaintiff went on medical leave to have surgery on her left knee. When she took leave, Plaintiff was classified as a Production Support employee in the Cut/Filler/Storage area of the Primary Processing Department. Work in this part of the plant takes place in a series of 20-foot high horizontal silos, with conveyor belts running through and between the silos. Plaintiff's Production Support job required her to work in, on, and around these silos and conveyor belts.

While on medical leave recuperating from her surgery, Plaintiff requested and was granted a transfer within the Primary Processing Department from the Cut/Filler/Storage area to the Blending area. Work in the Blending area takes place in 12-foot high vertical silos connected by conveyor belts. As a Production Support employee, Plaintiff's job would require her to climb a series of ladders while working in, on, and around the silos and conveyor belts of the Blending area.

In May 2000, approximately seven months after her surgery, Plaintiff attempted to return to work. Her orthopedic surgeon, Dr. Thomas E. Sikes, specified permanent medical restrictions prohibiting frequent stooping, bending, kneeling, or climbing more than six feet. In addition, Dr. Sikes imposed work-time restrictions of four hours of work per day for the first week back, six hours per day for the second week, and eight hours per

day thereafter. Because she was returning from medical leave with medical work restrictions, Plaintiff was evaluated by Theresa Scott, a registered nurse employed as a Rehabilitation Case Manager in Defendant's Occupational Health Services Department. Following procedure, Ms. Scott, who is black, contacted Plaintiff's area manager and supervisor, who are also black, to determine whether Plaintiff could return to her Production Support position in Blending[1] with her restrictions. They concluded that her permanent medical restrictions, especially those on stooping and climbing ladders, prevented Plaintiff's return to work in the Blending area.

In June 2000, Defendant asked Plaintiff to take a functional capacity examination ("FCE") and offered her a position in the Rework area compatible with her medical restrictions. Plaintiff refused the Rework position and initially objected to the FCE. When Plaintiff took the FCE in July 2000, the results were sent to her surgeon, Dr. Sikes, who again recommended medical restrictions. These restrictions permanently prevented her from: lifting more than 40 pounds; spending more than three hours per day squatting, climbing ladders, kneeling on her left knee or

[1] Plaintiff never actually worked in the Blending area, but because she transferred to Blending while on leave, that is the area to which she would, in the normal course, return at the end of her medical leave.

using a left foot pedal; and spending more than six hours per day bending at the waist or kneeling on her right knee. In addition, Plaintiff was not to work more than 40 hours per week.

With these restrictions in mind, Ms. Scott again sought the advice of Plaintiff's supervisors, who determined that her physical restrictions qualified her to work in the Receiving area within the Primary Processing Department. Because Plaintiff was limited to 40 hours of work per week, however, she could not be assigned to Receiving, where employees were at that time working seven days per week. Ms. Scott then looked to other departments at the plant for vacant positions compatible with Plaintiff's restrictions and found a compatible position in the Rework area of the Cigarette Manufacturing Department. Plaintiff began working in that job in August 2000 and has continued to work there through the course of this suit. Significantly, it is not disputed that Plaintiff's pay, benefits, Production Support job classification, and opportunities for promotion remain the same as they were before her medical leave.

Once in Rework, Plaintiff contends that she was discriminated against because her black supervisor permitted her black co-workers longer breaks, longer visits from other co-workers, and more liberal personal phone privileges. Plaintiff also asserts that she was not assigned a locker while her black

co-workers were. Finally, she contends that her black co-workers refused to talk to her or work cooperatively with her. For the purpose of deciding this motion for summary judgment, the court accepts Plaintiff's contentions as true.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where an examination of the verified pleadings, affidavits and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Where such evidence could lead a reasonable juror to find for the party opposing summary judgment, a genuine issue of material fact exists and summary judgment may not be granted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986). The basic question in a summary judgment inquiry is whether the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Where the nonmoving party fails to make a sufficient showing to establish an essential element of its case, summary judgment is proper because a "complete failure of proof" on an essential element

renders all other facts immaterial. Celotex, 477 U.S. at 322-23, 106 S. Ct. at 2552.

B. Americans with Disabilities Act Claims

Plaintiff alleges that she suffered discrimination prohibited under the ADA. To avail herself of the protections of the ADA, Plaintiff must first demonstrate that she suffers from an ADA-qualifying disability. See 42 U.S.C. § 12112(a); Martinson v. Kinney Shoe Corp., 104 F.3d 683, 685-86 (4th Cir. 1997) (citing Doe v. University of Maryland Med. Sys. Corp., 50 F.3d 1261, 1264 -65 (4th Cir. 1995) (setting out prima facie elements of ADA disability discrimination claim). The ADA defines a disability as a "physical or mental impairment that substantially limits one or more . . . major life activities" or "being regarded as having such an impairment." 42 U.S.C. § 12102(2). Because Plaintiff fails this threshold inquiry, Defendant will be granted summary judgment on the ADA claims.

1. Actual Disability

To demonstrate that she had an actual disability, Plaintiff must point to a major life activity which her physical condition substantially limits. Id. In interpreting the ADA, the court will be guided in part by the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"), although those regulations are not binding authority in this court. See,

e.g., Terry v. City of Greensboro, No. 1:02CV221, 2003 WL 151851, at *2 n.1 (M.D.N.C. Jan. 17, 2003) (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 142, 97 S. Ct. 401, 411 (1976) (explaining that EEOC regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance")). Under EEOC regulations, major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The EEOC interprets substantial limitations as "[s]ignificant[] restrict[ions] as to condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the person in the average population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii); see Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986) (explaining that, to constitute a substantial limitation, the "impairment must be a significant one").

Under this standard, Plaintiff's physical limitations, consisting of time restrictions on kneeling, ladder climbing, and operating foot pedals; a maximum work week of 40 hours (and maximum work day of eight hours); and a 40-pound lifting restriction, do not constitute a substantial limitation of a

major life activity. See, e.g., Thomas v. Northern Telecom, Inc., 157 F. Supp. 2d 627, 631 (M.D.N.C. 2000) (20-pound lifting restriction does not substantially limit a major life activity); Bailey v. Charlotte-Mecklenburg Bd. of Educ., No. 3:98CV565-MU, 2001 WL 1019736, at *8 (W.D.N.C. April 3, 2001) (ladder climbing not a major life activity and restrictions on duration of sitting and squatting do not substantially limit major life activities); Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 703-04 (S.D.N.Y. 1997) (plaintiff's inability to kneel, climb stairs, or climb ladders was "not sufficient to support the conclusion that her [condition] substantially limits a major life activity").

Plaintiff is also not substantially limited in the major life activity of working. The EEOC interprets a "substantial limitation" on working to be a significant restriction on the ability to perform a broad range of jobs. 29 C.F.R. § 1630.2(j)(3)(i); see Sutton v. United Air Lines, 527 U.S. 471, 491, 119 S. Ct. 2139, 2151 (1999). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id.; see Haulbrook v. Michelin North America, Inc., 252 F.3d 696, 703-04 (4th Cir. 2001); Terry, 2003 WL 151851, at *2. Plaintiff is currently employed at Defendant's factory in the same Production Support job classification as she was before her knee troubles;

clearly she is not prevented from working the broad range of manufacturing jobs, but instead is unable to perform only certain jobs which cause particular stress to her knee. As such, Plaintiff is not substantially limited in the major life activity of working. Finding no major life activity in which Plaintiff is substantially limited, the court concludes that she suffers no actual disability under the ADA.

2. Regarded as Disabled

The "regarded as" prong of section 12102(2) will afford Plaintiff ADA protection, even if she has no actual disability, if she can prove that she is regarded as having such a disability. See, e.g., Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) ("[T]he statute does not appear to distinguish between disabled and 'regarded as' individuals in requiring accommodation."). To prove that Defendant regarded her as disabled, Plaintiff must show that Defendant "mistakenly believes that [she] has a physical impairment that substantially limits one or more major life activities, or . . . mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." Sutton, 527 U.S. at 489, 119 S. Ct. at 2149-50. "In both cases it is necessary that a covered entity entertain misperceptions about the individual." Id. There is no factual dispute that Defendant, with no

misperception, was aware of the medical restrictions recommended by Plaintiff's orthopedic surgeon and sought to give effect to those restrictions. Attempts to respond to documented medical restrictions will not, standing alone, give rise to a finding of "regarded as" disability. See, e.g., Plant v. Morton Int'l, Inc., 212 F.3d 929, 937-38 (6th Cir. 2000) (employee not regarded as disabled simply because employer accommodates employee's medical restrictions); Mack v. Strauss, 134 F. Supp. 2d 103, 110 (D.D.C. 2001) (same); Moreno v. Grand Victoria Casino, 94 F. Supp. 2d 883, 899 (N.D. Ill. 2000) (same).

Plaintiff contends that her reassignment to the Rework area is evidence that Defendant regarded her as disabled. This assignment certainly indicates that Defendant felt that the restrictions recommended by Plaintiff's surgeon would prevent her from working in some areas of the plant, notably, Cut/Filler/Storage and Blending. It is an unsupported leap, however, to assume from this that Defendant regarded her as restricted in her ability to perform a broad range of jobs. As discussed above, the inability to perform a particular job is not a significant impairment of a major life activity; such an impairment requires an inability to work in a broad class of jobs. Because Defendant attempted to, and did in fact, place Plaintiff in a job within the broad category of manufacturing

jobs, it is clear that Defendant did not regard Plaintiff as unable to perform that broad category of jobs. Therefore, the reassignment of Plaintiff to Rework is insufficient to support her claim that she was regarded as disabled under the ADA.

Plaintiff also argues that Defendant's request that she take a functional capacity examination (FCE) is evidence that she was regarded as disabled. According to EEOC regulations, an employer "may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity." 29 C.F.R. § 1630.14(c). This court and many others have held that a request for a medical examination, without more, is not sufficient to establish that a plaintiff is regarded as disabled. See, e.g., Terry, 2003 WL 151851, at *4. Among the factors which a court should evaluate in determining whether a request for a physical examination can establish that an employee was regarded as disabled are whether the examination was limited to the condition which gave rise to the examination, and whether the employer had a reasonable basis to request the examination. See, e.g., id. Here, Plaintiff makes no allegation that the FCE extended beyond an evaluation of the effect her knee problems would have on her work, and the restrictions proposed by Plaintiff's own surgeon provided Defendant a reasonable basis to believe that Plaintiff's knee condition would have a direct

effect on her ability to perform certain job functions. The court accordingly concludes that Defendant's FCE request is not evidence that Defendant regarded Plaintiff as disabled under the ADA.

The court finds no other evidence relevant to the question of whether Defendant regarded Plaintiff as disabled. As Defendant correctly points out, Plaintiff's counsel argues other issues on this point, but without support in the record. Such unsupported speculation or argument by counsel is not evidence to be considered at summary judgment and does not create issues of material fact. See, e.g., Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 62 (4th Cir. 1995) (unsupported speculation); Morrissey v. William Morrow & Co., 739 F.2d 962, 967 (4th Cir. 1984) (argument of counsel). Accordingly, the court finds as a matter of law that Defendant did not regard Plaintiff as disabled under the ADA.

3. Conclusion as to Americans with Disabilities Act Claims

The court finds no genuine issue of material fact to indicate that Plaintiff suffers an actual disability under the ADA or that she was regarded as disabled under the ADA. Because Plaintiff's claim fails as a matter of law to satisfy this

threshold test for ADA protection, the court will enter summary judgment in favor of Defendant on Plaintiff's ADA claims.

C. Title VII Claims

Plaintiff asserts on multiple grounds that Defendant discriminated against her on the basis of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Because Plaintiff is unable to raise genuine issues of material fact supporting a prima facie case under Title VII, the court will grant summary judgment to Defendant.

To survive summary judgment in a Title VII action, Plaintiff may satisfy either of two tests. First, Plaintiff may present direct evidence that race was a determining factor in Defendant's employment decisions. See, e.g., Moyer v. Smurfit-Stone Container Corp., No. 1:0CV581, 2002 WL 31654526, at *2 (M.D.N.C. November 21, 2002) (citing Equal Employment Opportunity Comm'n v. Northwest Structural Components, Inc., 822 F. Supp. 1218, 1219 (M.D.N.C. 1993)). Because Plaintiff offers no direct evidence of race discrimination, she must proceed under the second test, which permits her to meet her burden using circumstantial evidence, following the McDonnell Douglas burden-shifting scheme. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). Under this scheme, Plaintiff must make an

initial evidentiary showing demonstrating a prima facie case of discrimination. Id. If established, the prima facie case then creates an inference of discriminatory action by Defendant, shifting the burden to Defendant to "articulate some legitimate, nondiscriminatory reason" for the action. Id. If Defendant meets this burden, Plaintiff must then be given an opportunity to show that Defendant's stated reasons are pretextual, serving only as a "coverup" for racial discrimination. Id. at 804-05, 93 S. Ct. at 1825-26. At all times, the plaintiff bears the burden of persuasion in showing that he or she was victimized by the defendant's intentional discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993).

1. Return to Work and Transfer to Rework Area

Plaintiff contends that she suffered racial discrimination under Title VII when Ms. Scott, Defendant's Rehabilitation Case Manager, who is black, and other black managers refused to let her return to work until August 2000, despite the fact that she attempted to return with medical restrictions to her job in the Blending area in May 2000. Plaintiff further argues that her transfer to the Rework area was racially discriminatory under Title VII. Because Plaintiff cannot establish a prima facie case for these claims, the court will grant summary judgment to Defendant.

To establish a prima facie case of racial discrimination under Title VII in the terms and conditions of employment, Plaintiff must demonstrate that: (1) she is a member of a protected class, (2) she was qualified and her job performance was satisfactory, (3) she suffered an adverse employment action, and (4) similarly situated employees not in the protected class received more favorable treatment. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1817-24; see also Brinkley v. Harbour Rec. Club, 180 F.3d 598, 607 (4th Cir. 1999).

Plaintiff's claim that she was discriminated against because she was not allowed to return to the Blending area fails under the second prong of the prima facie test, because she was not qualified for the Blending job in either May or August 2000. Neither Plaintiff nor her orthopedic surgeon disputes Defendant's conclusion that the medical restrictions imposed by Plaintiff's surgeon rendered her unable to perform the physically demanding job in the Blending area. This constitutes a total failure of proof on a prima facie element, qualification for the job, and the court will accordingly enter summary judgment in favor of Defendant on this claim.

Plaintiff's contention that her transfer to the Rework area was racially discriminatory under Title VII is not viable because that reassignment did not constitute an adverse employment

action. An employer's decision to transfer or not "does not qualify as an adverse employment action unless the decision 'had some significant detrimental effect' on the employee." Wagstaff v. City of Durham, 233 F. Supp. 2d 739, 744 (M.D.N.C. 2002) (quoting Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999)). "[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." Boone, 178 F.3d at 256-57; see also Vester v. Henderson, 178 F. Supp. 2d 594, 596-97 (M.D.N.C. 2001).

It is undisputed that Plaintiff's pay, benefits, Production Support job classification, and opportunities for promotion remain the same as they were before her transfer to the Rework area. Plaintiff raises no other facts that suggest her transfer to the Rework area constituted an adverse employment action, and the court accordingly finds that the transfer did not constitute an adverse employment action. Because "clear precedent indicat[es] that Title VII awards damages 'only against employers who are proven to have taken adverse employment action'" the court will grant summary judgment to Defendant on Plaintiff's

Title VII claims relating to her transfer. Boone, 178 F.3d at 256 (quoting Hicks, 509 U.S. at 523-24, 113 S. Ct. at 2756).

2. Discrimination in the Rework Area

Plaintiff claims that she suffered discrimination at the hands of her black supervisors in the Rework area. As evidence of this discrimination, Plaintiff points to her allegations that black co-workers in the Rework area were allowed more liberal break privileges, visitation privileges, and personal telephone privileges, all with the knowledge of their black supervisor. She also complains that she was not assigned a locker while her black co-workers were. Plaintiff points to two black co-workers in particular whom she claims were treated more leniently despite their poor productivity. Finally, she contends that her black co-workers refused to talk to her or work cooperatively with her. Accepting these allegations as true for the purpose of summary judgment, the court finds Plaintiff's burden of demonstrating a prima facie case unmet for lack of evidence of an adverse employment action.

An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus. v. Ellerth, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268

(1998); see also Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001). The Fourth Circuit has stated its "certainty that Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment." Boone, 178 F.3d at 256. To demonstrate an adverse employment action, Plaintiff "must establish more than a 'mere inconvenience or an alteration of job responsibilities.'" Nichols v. Comcast Cablevision of Maryland, 84 F. Supp. 2d 642, 654 (D. Md. 2000) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)).

Just as the transfer to the Rework area, discussed in part II(C)(1) above, fell short of the adverse employment action standard, the workplace frictions and petty injustices that Plaintiff experienced after her arrival there fall well short of the major employment actions contemplated by the Supreme Court in Burlington Industries, 524 U.S. at 761, 118 S. Ct. at 2268. Although the conditions in the Rework area that Plaintiff complains of have, if true, caused her inconvenience and understandable unhappiness, they are not adverse employment actions redressable under Title VII. Finding no other viable and relevant evidence offered by Plaintiff to support her claim of discrimination in the Rework area, the court finds that she has failed to demonstrate the adverse employment action element of

her prima facie case, and will therefore grant summary judgment to Defendant on this claim.

3. Hostile Work Environment

Plaintiff similarly claims that Defendant subjected her to a hostile work environment in the Rework area on account of her race. As evidence of the hostile work environment, Plaintiff raises the same issues supporting her claims of race discrimination in the Rework area, discussed in part II(C)(2) above: allegations that black co-workers in the Rework area were allowed more liberal break privileges, visitation privileges, and personal telephone privileges, all with the knowledge of her black supervisor; complaints that she was not assigned a locker although her black co-workers were; allegations that two black co-workers were treated more leniently despite their poor productivity; and contentions that her black co-workers refused to talk to her or work cooperatively with her. Accepting these allegations as true, they fall below the threshold for actions redressable under Title VII.

Under Title VII, a hostile work environment prima facie case must establish that the alleged harassment was (1) unwelcome, (2) based on race, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) that a basis exists to impute liability to the employer. See

Pettiford v. North Carolina Dep't of Health and Human Servs., 228 F. Supp. 2d 677, 693 (M.D.N.C. 2002) (citing Spriggs v. Diamond Auto Glass, 242 F.3d 179, 183-84 (4th Cir. 2001); Smith v. First Union Nat'l Bank, 202 F.3d 234, 241 (4th Cir. 2000).

Regarding the third prong, dealing with severe and pervasive conduct, "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — a work environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993). "Title VII is not a federal guarantee of refinement and sophistication in the workplace — in this context, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive." Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 773 (4th Cir. 1997). In evaluating whether conduct is severe or pervasive enough to alter the conditions of employment and create an abusive atmosphere, the court must consider the totality of circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23, 114 S. Ct.

at 371; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986).

Defendant correctly points out that Plaintiff alleges no threats or humiliation (physical or otherwise), offensive utterances, or interference with her job performance. Being treated less favorably than her co-workers with regard to breaks and other personal privileges, not being assigned a locker, and not enjoying the workplace camaraderie of her co-workers are certainly and justifiably important and troubling matters to Plaintiff, whether or not they are due to her race. If Plaintiff's contentions are accurate, she has been treated shabbily. Nevertheless, not all shabby treatment does a federal claim make, and the court finds after examining the totality of the circumstances of Plaintiff's work environment as it appears in the record, that the conditions she complains of fall short of the severe or pervasive conduct necessary to establish a Title VII prima facie case for hostile work conditions. Because Plaintiff is unable to make a prima facie showing of a hostile work environment under Title VII, the court will enter summary judgment in favor of Defendant on these claims.[2]

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[2] Plaintiff also raises a hostile work environment claim under the ADA, asserting that the same facts underlying the Title VII hostile work environment claim also support a hostile work environment claim under the ADA. To establish a hostile work

(continued...)

4. Retaliation

Plaintiff alleges that she was retaliated against after she complained of racial harassment and discrimination. To establish a prima facie case of retaliation, a plaintiff must show (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that some causal relationship exists between the two events. See Von Gunten, 243 F.3d at 863 (citing Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997)); Laughlin v. Metropolitan Washington Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998) (citing Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996)).

As discussed in parts II(C)(1) and (2) above, Plaintiff has suffered no adverse employment action, and thus fails to meet the

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[2](...continued)
environment prima facie claim under the ADA, a plaintiff must (1) be a qualified individual with a disability, (2) be subjected to unwelcome harassment based on that disability, (3) that is "sufficiently severe or pervasive to alter a term, condition, or privilege of employment," and (4) show a factual basis to impute liability to the employer. Fox v. General Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001). Given that this test incorporates the same "severe or pervasive" element as the test for a Title VII hostile work environment claim, the court will grant Defendant summary judgment on the ADA hostile work environment claim for the reasons discussed in the context of Plaintiff's Title VII hostile work environment claim. Compare id. (setting out elements of ADA hostile work environment claim), with Pettiford v. North Carolina Dep't of Health and Human Servs., 228 F. Supp. 2d 677, 693 (M.D.N.C. 2002) (setting out elements of Title VII hostile work environment claim). Further, as discussed in part II(B), Plaintiff is not disabled under the ADA and therefore fails to meet the first element of the Fox prima facie test.

second prong of the prima facie test.[3] Plaintiff is still employed by Defendant with the same pay, benefits, Production Support job classification, and opportunity for promotion as before her complaints of harassment and discrimination; she has suffered no disciplinary action; and she points to no other actionable adverse employment action. "[I]f a plaintiff is unable to make a prima facie showing that an actionable, adverse employment action occurred, then, by definition, the required causal connection between the protected activity and any alleged adverse action cannot be established." Taylor v. Virginia Dep't of Corrs., 177 F. Supp. 2d 497, 505 (E.D. Va. 2001). Because Plaintiff fails to make a prima facie showing of retaliation, the court will grant Defendant summary judgment on Plaintiff's retaliation claim.[4]

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[3] In her retaliation claim, Plaintiff raises no allegations of adverse employment action other than those addressed in the context of her Title VII discrimination claims in parts II(C)(1) and (2).

[4] Plaintiff also makes a claim of retaliation under the ADA. Such claims are governed by the same three-prong prima facie test for retaliation claims described above in the context of Title VII. Compare Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 216 (4th Cir. 2002) (setting out elements of ADA retaliation claim), and Rhoads v. FDIC, 257 F.3d 373, 392 (4th Cir. 2001) (same), with Von Gunten v. Maryland, 243 F.3d 858, 863 (4th Cir. 2001) (setting out elements of Title VII retaliation claim), and Laughlin v. Metropolitan Washington Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998) (same); see also Penny v. United Parcel

(continued...)

5. Conclusion as to Title VII Claims

The court finds no genuine issue of material fact to support sending Plaintiff's Title VII claims to the jury, which is to say that her Title VII claims fail as a matter of law.[5] Accordingly, the court will enter summary judgment in favor of Defendant on Plaintiff's Title VII claims.

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[4](...continued)
Serv., 128 F.3d 408, 417 (6th Cir. 1997) (citing Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997)) ("Retaliation claims are treated the same whether brought under the ADA or Title VII."). Because Plaintiff has suffered no adverse employment action, her ADA retaliation claim must also fail.

Plaintiff argues that in retaliation for seeking ADA accommodations, she was forced to use Family and Medical Leave Act ("FMLA") leave time to avoid forced overtime in excess of the 40 hours per week permitted under her medical restrictions. The record shows that this was consistent with the established policy of Defendant. Assuming for the sake of argument that the FMLA policy described here does constitute an adverse employment action, there is still no causal connection. Plaintiff raises no genuine issue of material fact (as opposed to unsupported argument and supposition of counsel) to suggest a causal connection between Plaintiff's ADA-protected activities and any adverse employment action, including the requirement that she use FMLA leave time. For these reasons, the court will grant summary judgment to Defendant on Plaintiff's ADA retaliation claim.

[5] The court notes that Plaintiff alleges that a similarly situated black employee of Defendant, Reneena Sutton, took medical leave to have knee surgery and was allowed to return to work with medical restrictions. Plaintiff argues that Defendant handled Sutton's return to work more favorably than it did Plaintiff's. Because the court finds Plaintiff's prima facie case lacking on other grounds for each of her claims, it is unnecessary to inquire further into her allegations of disparate treatment.

III. CONCLUSION

For the foregoing reasons, the court will grant Defendant's Motion for Summary Judgment.

A judgment in accordance with this memorandum opinion shall be filed this same day.

This the 29 day of July 2003.

William L. Osteen

United States District Judge